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CASE **m**: 2000-LHC-002515
2000-LHC-002516
2000-LHC-002517

OWCP **m**: 18-062916
18-073161
18-073253

In the Matter of:

John Rancic,
Claimant,

vs.

Matson Terminals, Inc.,
Employer,

and
Commercial Insurance Service,
Third Party Administrator.

Patrick Muldoon, Esq., for **Claimant**
James Aleccia, Esq., for **Employer and Carrier**
John Nangle, Esq., Asso. Regional Solicitor, for **District Director**, OWCP

Before: William Dorsey
Administrative Law Judge

– DECISION AND ORDER GRANTING BENEFITS –

John Rancic, who is 67 years old, has worked as a marine clerk in the Long Beach and Los Angeles harbors from 1963 through May 10, 1999. This case is a consolidation of three claims he filed under

the Longshore and Harbor Workers' Compensation Act, as amended, *codified at* 33 U.S.C. §§ 901-950 (the "Act"), against Matson Terminals, Inc., a permissibly self-insured employer, and Commercial Insurance Service, the employer's Third Party Administrator ("Employer"). After July of 1999, the Matson Terminals facility in the Long Beach, California area became part of SSA Terminals, Inc. Employer controverted the recommendation of the Office of Workers' Compensation Programs in the memorandum issued following the informal conference of May 19, 2000 (EX 4 at 15). The Notice of Calendar Call entered on August 9, 2000, required certain filings by all parties before the final hearing which was held from December 13-15, 2000, in Long Beach. Claimant and Employer presented evidence and argument at the final hearing. Claimant's Exhibits 1-36, 40-47, 49, and 51-53 were admitted into evidence, as were Respondents' Exhibits 1-25[1] (Tr. at 117, 121). The parties were permitted to file post hearing depositions, which included those of James London, M.D., claimant's treating orthopedist (CX 55); Geoffrey Miller, M.D., the Employer's orthopedic expert (EX 26, including the letter annexed as EX 1); and a lay witness Frank A. Scognamillo (CX 54). The record was closed by an order entered on February 5, 2001. The parties thereafter filed proposed findings of fact and conclusions of law in hard copy by late March 2001, and filed their proposed decisions in electronic format in early April, 2001.

I.
STATEMENT OF THE CASE

This case involves two principal benefit claims, and a tangential third one. The first claim asserts that on February 20, 1996, Mr. Rancic was working as a steady supervisory or chief marine clerk for Matson Terminals, Inc.[2] He slipped while out among the lanes of traffic, fell against a bench, and struck his right arm, shoulder, neck and head before he fell fully to the pavement (EX 1 at pg.1, ¶ 24). This caused him injuries, and to experience neck pain, upper back, right shoulder and mid-back pain, as well as headaches (Ibid., ¶ 25). The tangential claim alleges a similar slip and fall accident on February 29, 1996, with resulting injuries to the right arm, shoulder, neck and back (EX 1 at 2). The parties have stipulated that the February 29, 1996 occurrence did not cause injury, and that it was directly attributable to the February 20, 1996 accident. The third claim is the other principal one. It alleges an aggravation of the February 1996 injury to his neck and back caused by continuous, repetitive neck and body movements from his work as a marine clerk (EX 1 at pg. 4, ¶ 24). At the final hearing, the parties stipulated that the only specific trauma injury date was February 20, 1996, and that all

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[1] The following abbreviations are used: Tr. is the transcript of the December 13-15, 2000, hearing; CX are Claimant's Exhibits; EX are Employer's Exhibits; Gagnon depo. is the Deposition of Paul Gagnon; Scognamillo depo. is the deposition of Frank A. Scognamillo; London depo. is the deposition of James T. London, M.D.; and Miller depo. is the deposition of Geoffrey Miller, M.D.

[2]Matson is now a part owner of a new entity, SSA Terminals, Inc., which operates the Matson facility where Mr. Rancic had worked (Gagnon depo. at 113).

references to an injury date of February 29, 1996, actually applied to the injury of February 20, 1996, which led claimant to cease work on May 10, 1999 (Tr. at 4-5).

A. Claimant's Contentions

Mr. Rancic says that the February 20, 1996, fall caused a permanent aggravation of pre-existing disc disease in his cervical spine. As a result of his continued work up through May 10, 1999, he aggravated this pre-existing condition from cumulative trauma to the point that he had to leave his work. From May 11, 1999, to the present, and continuing indefinitely into the future, he has been totally disabled from any gainful employment, including his usual duties as a marine clerk, as well as from jobs away from the waterfront. He seeks an award of future medical care and treatment for the alleged aggravation injury culminating on May 10, 1999. He also seeks interest on all unpaid benefits, annual adjustments pursuant to §10 (f) of the Act, and reimbursement to the State of California for disability benefits paid to him by the State's Employment Development Department in return for the insurance premiums he had paid for that state-sponsored insurance. Lastly, he seeks an award of attorney's fees incurred and costs expended in prosecuting these claims.

B. Employer's Contentions

Employer agrees that Claimant sustained a compensable injury arising out of and during the course of his employment on February 20, 1996, but contends that this fall only resulted in a temporary exacerbation of his pre-existing, longstanding condition of cervical disc degeneration. Employer argues that this incident caused no loss of earning capacity, and therefore, Claimant has no entitlement to additional disability benefits for his injury.

Employer denies the allegation that Mr. Rancic sustained a cumulative trauma injury to his neck, culminating on his last day of employment on May 10, 1999. Even if I find a deterioration in his neck condition after February 20, 1996, Employer argues that the deterioration was attributable to the natural progression of the pre-existing condition of his cervical spine, a progression which would have occurred without regard to his employment. Employer maintains that Claimant has been fully capable of performing his usual and customary job duties as a marine clerk, as he had done for more than three years after his February 20, 1996 injury, and that he is not entitled to additional disability benefits.

Even if Claimant does have work restrictions attributable to his employment, Employer says that he could perform the job duties of a marine clerk within those restrictions. He would have to adhere to modifications to his job, such as the use of a hand held mirror to view the letters and numbers on the containers, swivel in his chair rather than turn his head while working, and hold papers up rather than allow them to lie on a desk. Employer characterizes these modifications as minor, and asserts they would not affect his job performance. Employer also believes that if he could not return to work as a marine clerk, it has carried its burden of identifying suitable alternative employment available to Mr. Rancic, in light of his age, education, work experience and physical restrictions.

In the event Mr. Rancic is awarded permanent disability benefits, then Employer believes it is entitled to have its liability for those benefits limited to a period of 104 weeks pursuant to § 8 (f) of the Act. Lastly, because Employer contends that Claimant is not entitled to additional benefits, it has no liability to pay Mr. Rancic's attorney's fees and costs.

C. District Director's Contentions

The District Director did not file the Statement of Position and other information required by the pre-hearing order when due. This could have subjected him to sanctions; the pre-hearing order had informed him that the sanctions authorized under 29 C.F.R. §§ 18.6(d)(2) and 18.29 could include a limitation on his presentation of evidence. In an effort to obtain a full record on all issues involved, I entered a further order in this and other cases on November 17, 2000, which required the District Director to serve the material required by the original pre-hearing order, including disclosure of his position on the employer's application for § 8 (f) relief, and the evidence he would rely on to support his position. *See* Order Requiring District Director's Statement of Position on the Pending Application for Special Fund Relief entered on November 17, 2000, pg. 3, ¶¶ 1 through 4. He was informed in the closing paragraph that failure to submit a "substantive and timely" response could result in a preclusion from submitting evidence or argument at the final hearing to challenge the proof offered by those parties which had complied with the pre-hearing disclosure order. The District Director filed a Statement of Position on November 27, 2000, but did not appear or participate in the final hearing, and submitted no evidence. He contends that if the Employer's medical expert is correct that claimant can return to his pre-injury work, no relief is available under § 8 (f). He also opposes Special Fund relief for the employer under § 8 (f) on the ground that the contribution requirement (for a materially and substantially greater disability resulting from the injury asserted by claimant) has not been satisfied. He concedes that § 8 (f)'s other 2 requirements, that there be a pre-existing disability and that it be manifest to the employer, are met. The District Director's response to the November 17th order temporized, however, stating that:

> "if the respondents are able to perfect their request for Special Fund liability before the Office of Administrative Law Judges providing sound medical reasoning which supports a materially and substantially greater disability as a combined result of the subject injury with the pre-existing disability, we will not oppose a Finding and Order mandating payments from the Special Fund. (Director's Pre-Hearing Statement of Position at 3)

This position is unhelpful, as it merely advises me that if Employer proves entitlement to relief, it should have it. By failing to take a meaningful position on the specific facts applicable to this claim, and declining to appear or participate in a meaningful way at the final hearing, the District Director has waived any right to have its straddling "position" considered or to object to the outcome here. *See generally, Director, Office of Workers' Compensation Programs v. Coos Head Lumber & Plywood Co*., 194 F.3d 1032, 1035 (9th Cir. 1999); *Nelson v. Stevedoring Services of America*, 2000 WL 1133562, 34 BRBS 91, 95-96 (DOL Ben. Rev. Bd. 2000).

II.
JOINT STIPULATIONS OF THE PARTIES

The parties (without the participation of the District Director) were able to reach the following stipulations of fact:

1. The Longshore Act governs this matter;
2. An employer/employee relationship existed as between Mr. Rancic and Employer at all relevant times;
3. Claimant sustained a compensable injury to his neck arising out of and during the course of his employment on February 20, 1996;
4. Claimant gave timely notice, pursuant to § 12 of the Act, for each of his alleged injuries;
5. Claimant filed timely claims, pursuant to § 13, for each of his alleged injuries;
6. At the time of the February 20, 1996, industrial incident, Mr. Rancic had an average weekly wage of $2,306.89, with a corresponding compensation rate of $782.44. At the time of the alleged May 10, 1999, cumulative trauma injury, he had an average weekly wage of $2,687.94, with a corresponding compensation rate of $871.76;
7. Employer has provided Mr. Rancic with all reasonable and necessary medical care and treatment in a timely manner for the admitted industrial injury of February 20, 1996;
8. After the February 20, 1996, industrial incident, Mr. Rancic's medical condition reached a permanent and stationary status as of May 7, 1997, as stated by his treating physician, James T. London, M.D., in his report dated May 10, 1997. For the alleged cumulative trauma injury of May 10, 1999, his condition had reached a permanent and stationary status as of October 8, 1999, as opined by Dr. London in his report dated October 12, 1999;
9. Employer timely controverted Claimant's entitlement to benefits pursuant to § 14 of the Act, and there is no claim for penalties under that portion of the Act.

These stipulations have been admitted into evidence and are binding upon Claimant and Employer, 29 C.F.R. § 18.51; Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 135 & n. 2 (DOL Ben. Rev. Bd.1990). While coverage under the Act cannot be conferred by stipulation, Littrell v. Oregon Shipbuilding Co., 17 BRBS 84, 88 (DOL Ben. Rev. Bd.1985), coverage is present here. The stipulations are reasonable in light of the record evidence and I accept them.

III.
ISSUES IN CONTROVERSY

These are the issues presented for resolution:

1. Whether Mr. Rancic suffered compensable cumulative trauma injury to his cervical spine culminating with his last day of employment on May 10, 1999;

2. The extent of his disability, if any, arising from the February 20, 1996, admitted injury and whether his disability was increased by cumulative trauma at work until May 10, 1999;

3. Whether Claimant is entitled to medical care and treatment under § 7 of the Act for trauma culminating when he left work as of May 10, 1999;

4. Whether Employer must reimburse the Employment Development Department of the State of California for disability insurance benefits that government agency paid to Claimant after March 4, 2000;

5. Whether Claimant is entitled to recover, under § 14 of the Act, interest on any disability benefits found to be due and owing after Employer suspended his benefits on March 4, 2000;

6. Whether Claimant is entitled to annual adjustments under § 10(f) of the Act on any permanent total disability award;

7. Whether Claimant is entitled to an award of attorney's fees and costs under§ 28 of the Act; and

8. Whether Employer is entitled to§ 8(f) relief, if C
laimant is entitled to permanent disability benefits.

IV.
FINDINGS OF FACT AND LEGAL CONCLUSIONS

A. Traumatic Injury in 1996.

John Rancic is a member of the International Longshore Warehouse Union, Marine Clerk's Local 63, Wilmington, California. His steady[3] work as a marine clerk for Matson Terminals began in 1988, when he worked there as a gate clerk (Tr. at 174). By 1996, he had become a steady chief supervisor marine clerk, in charge of marine clerks working in the Matson auto lot and at the gates (Tr. at 174-75). On February 20, 1996, he was outside the clerk's office while engaged in his work duties, and due to rain, he slipped and fell on wet pavement as he stepped from a curb (Tr. 175). After attempting to catch himself, he extended his arm to brace himself as he fell against a bench. He testified " I kind of

[3] "Steady" work is regular employment by a single maritime employer, without the need to be sent there daily from the joint dispatch hall operated by the union and the employers' group, the Pacific Maritime Association. Otherwise, a marine clerk can be sent from the joint dispatch hall to a different maritime employer every day there is work available. After a union member has mastered certain job assignments to become a "key" employee, has been placed on a joint promotions list, and has put 18 months to 2 years into the hiring hall, the decision to hire a marine clerk as a "preferred" or "steady" employee is solely the employer's (Tr. 167). Either the clerk or employer can terminate the relationship without the need to give any reason (Gagnon depo. pg. 101), but one reason terminations occur is a steady employee's failure to meet the employer's productivity expectations (Tr. 168-69).

snapped my neck," as he fell to the ground (*ibid*.), injuring his neck, shoulders, and arms (Tr. 177). He reported the incident to his superintendent, Mike Mitchell, who prepared a slip authorizing him to see a doctor at company expense (Tr. at 175-77; CX1).

Employer argues that Claimant did not originally mention hitting his head in the fall (Employer's Proposed Findings of Fact at pg. 12, line 13 *ff*.), but I find Claimant's testimony credible and consistent with the record as a whole, which shows:

a. The Matson accident report prepared on the day of the incident by a Matson supervisor describes the accident as "slid and fell wet pavement, oily base." (CX 1).

b. The Doctor's First Report of Injury by Dr. Ursich, the treating chiropractor, describes the incident in ¶ 17 as "Patient states he slipped on wet pavement" (CX 2), the first objective finding the treating chiropractor listed is "[r]educed cervical range of motion with pain at margins..."(*ibid*. at ¶ 19), and the diagnosis is "[a]cute post traumatic cervical /thoracic lumbar strain sprain" (*ibid*. at ¶ 20). This focuses on a neck injury, and is consistent with the testimony at the final hearing.

c. The initial report of James T. London, M.D., who became the treating orthopedist, is not entirely clear on the mechanism of the fall. That examination was not done until April 24, 1996 (CX 9 at 86). It seems to focus on the second fall (the one on February 29,1996, which the parties have stipulated is not a primary issue). But Dr. London's initial report mentions an "earlier" fall at work, which happened about 2 weeks before, at the same spot. I infer that it was the fall of February 20, 1996. Dr. London records in his report that claimant "states that at the time of the prior fall he hit his head against his right arm."(CX 9, at 87). This is consistent with the testimony at the final hearing in so far as it mentions a head injury from the fall, although it does not say his head hit the bench.

d. Mr. Rancic described the incident as "Slipped on wet pavement, fell against a bench, right arm, shoulder, neck and head struck pavement" in his claim for compensation (form LS-203) dated May 21, 1996 (EX 1, ¶ 24). While not written contemporaneously with the first fall on February 20, 1996, this May 1996 statement that his head struck the pavement was made early on, and rebuts the implication that a claim of a head or neck injury from the fall was fabricated for the final hearing.

e. Todd H. Lanman, M.D.'s report from October 1996, in the portion on the history of the injury, quotes Mr. Rancic as stating I "hurt my neck" on February 20, 1996 (CX 5).

f. At his deposition on January 17, 2000 Mr. Rancic again described the February 20, 1996 incident as one where he "fell and hit the bench. And good thing I put my hand up like this, otherwise I would have broke my jaw..." (EX 18 at 285-286).

Employer adduced no witnesses to the fall, to dispute Claimant's version of the event. Claimant's descriptions quoted above are not stated identically each time, but they are not contradictory. Mr.

Rancic has been sufficiently consistent in describing what happened to him for me to accept that he suffered a neck injury and has had cervical pain after hitting his head in a fall at work on February 20, 1996.

B. Early Treatment.

Not long after the fall Mr. Rancic selected Tim Ursich[4], D.C., to be his treating doctor. Dr. Ursich, a chiropractor, had previously treated him (Tr. at 177-78)[5]. Dr. Ursich diagnosed acute post traumatic cervical/thoracic lumbar sprains/strains, for which he recommended conservative physical therapy (CX 2 at 2). Claimant had an MRI scan of the cervical spine on April 5, 1996 (CX 4 at 14-15). His therapy occurred about 3 times per week for a period of about 3 or 3½ months after the injury (Tr.182, 187). When the Employer later controverted the chiropractic care in April 1997 (EX 4, at 11), Dr. Ursich thought Claimant was capable of continuing to perform his usual and customary pre-injury job duties (CX 3 at 4).

Employer scheduled an orthopedic evaluation for Mr. Rancic by James T. London, M.D., an orthopedist, on April 24, 1996. Dr. London previously had performed a successful shoulder surgery for him (Tr. at 189-90, 312-13; London depo. at 57)[6]. Dr. London reviewed the MRI results, from which he concluded that claimant had sustained a cervical strain as a result of the work-related accident on February 20, 1996.[7] Cervical disc disease also was shown on the MRI which, Dr. London believed, was aggravated by the fall, *see* his report dated May 14, 1996 (CX 9 at 88), although Claimant remained capable of performing his usual and customary work without restrictions (CX 9 at 89).

After the MRI and Dr. London's evaluation, in August 1996 the chiropractor, Dr. Ursich, suggested a neurosurgical evaluation by Todd H. Lanman, M.D. (CX 3 at 6). The request was not immediately approved, so Dr. Ursich renewed the request in October (CX 3 at 5). Dr. Lanman ultimately

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[4]The court reporter rendered the name as Zurzich in the transcript.

[5] It seems reasonable that Mr. Rancic sought treatment from someone he had seen before. While Dr. Ursich could find no records of earlier treatment when he looked for them during his deposition (EX 19 pg. 357-58), this is not significant to me, for even if Mr. Rancic were wrong on this, it would not affect my opinion of his credibility. The problem may just as well be with the ready accessibility of Dr. Ursich's remote records.

[6] That surgery was a resection of the distal clavicle at the acromioclavicular joint. It resulted in work restrictions of no ladder climbing, no heavy lifting (over 30 pounds), no prolonged overhead lifting, or overhead work (London depo. at 105). His work as a gate clerk was compatible with these restrictions.

[7] The February 29, 1996 incident is disregarded by stipulation of the parties.

examined Claimant, and gave the opinion that cervical surgery would be necessary to relieve the effects of the industrial injury of February 20, 1996 (CX 5 at 16-18). Dr. Lanman also suggested that, if he should not elect to have surgery, he should consider cervical epidural steroid injections (Tr. 198). No other surgeon has suggested surgery for Mr. Rancic's condition, and he does not seek authorization for surgery in this case.

Following Dr. London's initial examination, Mr. Rancic requested that he be treated by Dr. London, who once again became Mr. Rancic's treating physician. Examinations and evaluations continued through the remainder of 1996; Dr. London followed him, prescribed medications and gave prescriptions for physical therapy done at Palos Verdes Rehabilitation Clinic beginning on April 29, 1996 through May 16 (Tr. 190; CX 40 at 512-566). When he first presented at Palos Verdes in late April 1996 he exhibited guarded posture, with an inability to fully retract his head or turn his neck (CX 40 at 549). He also continued to receive chiropractic treatment from Dr. Ursich through November 1996 (CX 3 at 3) and again from February through July, 1997 (Tr. 203), at times seeing Dr. Ursich and Palos Verdes Rehabilitation Clinic on different days in the same month to control the pain in his neck and upper arms so he could keep working (*id*. at 203-04, 208). Claimant subsequently received a Notice of Controversion filed by the Employer in April 1997, challenging further chiropractic care (EX 4 at 11; CX 15 at 95). He also saw another chiropractor for treatment, Scott Sanders, D.C., from early September 1997 through December of that year (CX 41). He returned to Palos Verdes Rehabilitation Clinic for therapy in February 1998 (CX 40 at 543) through mid-July 1998 (*id*. at 529) on orders from Dr. London (CX 9 at 67, 73); from June 1999 to August 12, 1999 (CX 40 at 519 to 524) on orders from Dr. London (CX 9 at 59, 61); and from May 1, 2000 through June 7, 2000 (CX 40 at 513 to 515) on orders from Dr. London (CX 9 at 39). He also was engaged in a home exercise program and did cervical traction at home (CX 40). Claimant found that physical therapy treatments and pain medications allowed him to continue to work (Tr. 190-192)[8]. He was in physical therapy regularly from the period from his fall until he left work (London depo. at 51).

C. Exertional and Non-Exertional Requirements of the Job of a Marine Gate Clerk. After the fall, Mr. Rancic continued to perform his usual job duties as a chief supervisor marine clerk without time lost from work (Tr. 180-81). As chief supervisor, Mr. Rancic would arrive at the workplace at 6:30 a.m. to ready the printers and computers for the gate clerks who would arrive at 8:000 a.m. He assigned them to gate booths and assisted them with the Matson procedures for working with the two computers in each booth, and instructed them on how to survey the containers that went into the yard for damage. Any damage would be recorded on a survey slip. The survey which clerks were taught to perform were not cursory ones, but required the clerk to walk from the front of the container and go around, bending the clerk's body and neck to do the inspection of the whole exterior of the container (Tr. 206). As the chief supervisor, Mr. Rancic was always available by

[8] According to billing records he continued therapy at Palos Verdes Rehabilitation Clinic until June 2000 (well after he ceased work) (CX 40 at 561).

a pager or cell phone[9] to deal with problems which arose in the course of the day. This was stressful, and as his pain worsened over time, Mr. Rancic decided to give up the supervisory duties and return to the job of a gate clerk in December of 1996, in the hope that the reduction in duties and related stress would reduce his pain (Tr.192-93, 207).

From December of 1996, Mr. Rancic returned to the job of a gate clerk, without reduction in his earnings (Tr. 285). In the booth as an incoming gate clerk at Matson, Mr. Rancic was the first contact the terminal had with the truckers entering the yard to drop off loaded or empty containers, or to pick up containers out of the Matson freight yard. The Matson gate booths were elevated so that he would be at eye level with the trucker, and were designed so that he would work 2 lanes of traffic, with windows on both sides so he could deal with truckers entering the yard by lanes on each side of his booth. Booths contained 2 work stations, one for each side (including 2 computers) (Tr. 40-41). One traffic lane had a scale to weigh the truck and its container, the other did not (Scognamillo depo. at 20). There also was a door at the end of the booth. By alternating work on each side, he would keep both lanes of trucks flowing, although more trucks enter on the scale side (Scognamillo depo at 28).

As a truck pulled up, he scanned the bar code on the gate pass the driver presented. This brought up information about the container's load and freight conditions, the destination ports, the vessels, shipping lines, commodity information or any hazards presented by the contents (Gagnon depo. pg. 39). He also would survey the container and chassis for damage, input the container number and the chassis number of the truck into the computer, and change screens to go to the booking screen for the applicable booking number, create and print an interchange equipment release form and hand it to the driver through the window (Tr. 37, 40). If the trucker was driving a bob tail truck (one pulling no chassis and therefore not loaded with a container), he would direct the driver to the location of the chassis and container to be picked up. If the truck was bringing a loaded container into the Matson lot, he would record the net weight of the load, and he would also place a magnet on the container to help with its identification once in the lot, using a tool to affix the magnet (Tr. 44-47, 52; Gagnon depo. at 52), verify the numbers on the seal set on the load at the back of the truck, and check placards (Tr. 45-47). If it was a refrigerated container, he would check and record the temperature of the container (Tr. 53). If the container was empty, he would have the driver open its doors so he could inspect the inside of the container (Tr. 37). The interaction would average between 3 to 8 minutes per vehicle (Tr. 53). Sometimes truckers came to the wrong terminal, the bookings would be full, or the trucker had some other problem, and he would use the telephone in the booth to find out where the trucker should go or what he should do (Tr. 54).

After he finished with a trucker in his first lane, as he moved to work with the driver occupying the second lane, a new truck would pull up in the first lane, and wait for him. On one side of a booth (the scale side), the gate clerk was on the same side as the truck driver, and their interaction was direct.

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[9] The exact type of communication device was not clear to me.

When working the other side of the booth, the interaction had to take place across the passenger side of the truck, requiring Mr. Rancic to extend his neck (i.e., to raise his chin) and to extend his upper extremities to handle the trucker's paperwork. He also would have to get out of the chair and reach out about 3 ½ feet (Tr. 41). In many of those cases, the trucker would exit his truck as Mr. Rancic worked with the driver in the scale lane, and would enter the back of the booth to conduct his transaction (Gagnon depo. at 53). Gate clerks sometimes referred to this door at the booth's back as the "third window" (Tr. 216). Whenever a trucker entered the booth this way, most of that interaction involved lateral rotation of the head, as the monitor and keyboard Mr. Rancic worked with would be perpendicular to the position of the trucker at the end of the booth. After a trucker drove off and had entered the yard, if he could not locate the container he was to pick up, he would return on foot to the booth for assistance, so there could be one driver at the scale side window and two drivers (or more) inside the booth, competing for attention (Scognamillo depo. at 12).

Occasionally (perhaps 5 time a shift), he had to exit the booth to inspect cargo which was not in a container, but banded, strapped down or chained to a "flat rack." He felt the strapping to verify that the cargo was tightly restrained, and measured it for length, width and height, which the vessel cargo planner needed to know (Scognamillo depo. at 38-41). This information was then entered into the data base using the keyboard.

The Los Angeles/ Long Beach harbor is the 3rd largest container port in the world (Tr. 59). To get some idea of the pace of the work, given the schedule of ship arrivals and sailings, the incoming traffic at Matson's gate would be lighter on Mondays and Wednesdays, heavier on Tuesday and Thursday, and heaviest on Fridays (Gagnon depo. at 58). As many as 270 trucks pass a booth during the course of a work day at Matson's gate (Tr. 49; see generally Gagnon depo. at 105). This work pace meant there was a constant need to flex and extend the neck, to rotate the neck laterally and to extend the upper extremities to work at the gate (Tr. 214-219).

The job is performed somewhat differently at Matson since mid-October 2000, as compared to when Mr. Rancic last worked there in May 1999. Matson installed video cameras in the clerk's booths (Gagnon depo. at 98). This was done to assist the gate clerk is seeing the rear of the container to read chassis and container numbers (Gagnon depo. at 93-4), and to reduce the need to exit the booth. I do not believe that the installation of video cameras at Matson's gates, remotely controlled by the clerk in the booth by a type of control box, and capable of zoom focus, would significantly reduce the frequency of cervical flexion, extension or lateral rotation. Neither would it significantly reduce extension of the upper extremities in dealing with truckers. It would not reduce the need to exit the booth to inspect, test and measure flat racks. It should reduce the need to exit the booth to read container numbers and to survey the chassis/containers for damage, however. I flatly reject as unrealistic the idea that with the new equipment, a gate clerk could essentially hold his or her head still, raise papers to eye level to avoid looking down onto the desk, adjust the camera angles and focal length by the hand controls, and merely shift his or her eyes or swivel in the chair rather than move his

or her head to do the job.[10] Anyone doing that job would constantly move his or her head (extending and flexing the neck) to speak to the trucker, view the paperwork, see the video monitor and use the keyboard. One would also move the head from side to side in lateral rotation to interact with the truckers driving up to either side of the booth or entering from the "third window" at the back.

This description of the job duties and exertional activities of maritime gate clerks at Matson's gates would also apply generally to the work marine gate clerks perform at the other maritime employers in the Los Angles/Long Beach area. The gate clerks all work under a master contract with the employers which comprise the Pacific Maritime Association (see also Tr. 40-47, 480). All employers do not have identical facilities, however. Mr. Rancic is no longer a steady employee at Matson, so if he were to return to work as a gate clerk, there is no reason to believe that he would regularly work at Matson's facility now operated by SSA Terminals. It is more likely that he would be sent to any of the maritime employers of gate clerks. The unionized marine gate clerks are sent out of the joint employer/union dispatch hall as the combination of employers' need for them dictates and their union seniority permits, see fn. 3 above.

Neither is it clear to me that this same remote control video system, now found at Matson/SSA Terminals, is available to clerks at any other maritime employers. There was testimony that some other employers have remote cameras, but it was not specific about their systems. The bulk of the testimony focused on the system now installed at Matson/SSA Terminals. As it was unconvincing that Matson's set up would eliminate or nearly eliminate extension, flexion and lateral rotation of the neck, the idea that a clerk could work at the other employers and avoid these movements is quite thin and even less convincing. There was some post-hearing testimony from Mr. Scognamillo about which employers use cameras, but it was general, and not based on recent experience in working for those employers. Mr. Scognamillo had been a steady employee at Matson/SSA Terminals for 8 years as of the time of his post-hearing testimony (Scognamillo depo. at 84).

Thus, physical activity required of a marine gate clerk involves obtaining written and oral information from truckers on both sides of the gate booth, reaching to receive and return paperwork to them, recording weights of containers, checking for and recording hazardous cargo, examining and measuring flat rack loads, dealing with truckers who enter into the gate booth, entering information into the computer by the keyboard, and reaching up and out to attach magnets to the rear of containers entering the yard. These activities require not only repetitive but virtually continuous use of the neck in flexion and extension, as well as rotation, repetitive use of the upper extremities, and commonly working at a pace which leaves the gate clerk under stress (Tr. 215-219).

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[10] Dr. London is familiar with marine clerk positions, and thought that keeping the head in a fixed plane would require a tremendous amount of eye movement, and if claimant were to be dealing with trucks on each side of the booth, this was impractical (London depo. at 33-4, 42, 97-9).

The idea that extension of the head and neck (*i.e.*, upward gaze) by a gate clerk could be significantly reduced by the use of a hand held mirror or a mirror on a stick to obtain container numbers fails to persuade me. This has not been used elsewhere, according to the testimony of the current President and Business Agent of the International Longshore Warehouse Union, Local 63, Tom Warren. It is not practical (Tr. 142), as the letters or numbers on the container will appear backwards in the mirror, raising the likelihood of errors in the information recorded that way. The terminal general manager did not think that the use of a hand held mirror would be practical (Gagnon depo. at 68, 98), nor did the actual gate clerk who had been photographed in his work by the employer, who testified by deposition after the final hearing (Scognamillo depo. at. 37, 63). Representatives of labor and management and a Matson gate clerk uniformly do not regard the use of a mirror as a viable accommodation in the work environment at Matson/SSA Terminals. The witness who advocated this was the vocational expert, Mr. Johnson. When weighed against the testimony from these witnesses who are experienced in or familiar with the work, Mr. Johnson's testimony is not persuasive on this point. Under the normal circumstances for performing the duties of a gate clerk in a booth with a video camera, such as installed at the Matson/SSA facility now, the use of such a mirror would be eliminated (Tr. 142; Scognamillo depo. at 38). Neither do I find in this record enough evidence about the specific physical facilities at the other maritime employers of gate clerks in the Los Angeles/Long Beach area to make a meaningful evaluation of the feasibility of using a mirror, in the manner suggested, at those terminals. I find that the use of a mirror is not an accommodation which would permit a person with Mr. Rancic's limitations in cervical extension to perform the work of a gate clerk.

D. Claimant's Cumulative Trauma Injury and Treatment.

Before taking Claimant off work in May 1999, Dr. London twice had expressed the opinion that Claimant had reached maximum medical improvement,[11] and was capable of performing his usual and customary work without the need for work restrictions (EX 10 at 105, 107). The repeated, frequent flexion and extension of the neck and of the upper extremities did worsen the pain symptoms in Mr. Rancic's neck and shoulders (Tr. 209). Over time his symptoms increased, even with the various types of therapy he was involved in, so that his symptoms of pain and headaches intensified over the course of a day, and were more worse later in the work week than at its beginning (Tr. 219). These symptoms were present before the examination by Dr. London on May 12, 1999. On Monday, May 10, 1999, Mr. Rancic had such severe symptoms that on his mid-morning break he called Dr. London's office for an appointment, which was not available immediately. He did not work on Tuesday May 11; he was able to get an appointment on May 12, 1999. His pain had increased by then to the point that it was no longer tolerable for him to work (Tr. 220, 223).

During Dr. London's examination on May 12, 1999, Mr. Rancic complained of increased pain in his neck over the previous two days. The doctor recorded complaints of increased neck pain associated

[11] In California workers' compensation jargon, this is expressed as being "permanent and stationary".

with movement of the neck, and associated severe neck stiffness aggravated by repeated lateral rotation and extension at work (CX 9 at 68). During his physical examination Dr. London found that Claimant had limitations in the range of motion of his neck. He could rotate the head laterally to the right 45 degrees of a normal 90 degrees and to the left 25 to 30 degrees of the normal 90 degrees; his lateral bend *(i.e.*, ear to shoulder) was 30 degrees on the right of a normal 35 degrees and 0 degrees on the left. His head extension (chin up, head tilted back) was 10 to 15 degrees of the normal 35 degrees. For the first time after the February 20, 1996 industrial fall, following his May 12, 1999 examination of Claimant, Dr. London placed Claimant on temporary total disability (CX 9 at 69). On June 8, 1999, Employer began to pay temporary total disability benefits without a formal award (LS 206; EX 3 at 9; CX 16 at 96). Mr. Rancic's last day of employment was on May 10, 1999 (EX 14 at 153).

Shortly after he left work, Dr. London ordered a second MRI scan of Claimant's cervical spine, which was done on May 27, 1999 (CX 9 at 62-63). It confirmed degenerative disc disease of the cervical spine at the C4-5, C5-6 and C6-7 levels, with flattening of the dural sac at each level, particularly at C4-5 (*Ibid.*).

After that second MRI, Dr. London referred him to two additional physicians, N.A. Nabavi[12], M.D. (CX 6 at 19-21), and Kamran Ghadimi[13], M.D., (CX 7; Tr. 230). The report of Dr. Nabavi in July 1999(CX 6) shows that after the doctor's physical examination and review of the MRI film of May 27, 1999, he believed that claimant had osteoarthritis and degenerative disc disease at multiple cervical levels, and he recommended that if symptoms continued, epidural injections should be considered, with a repeat MRI within a year. Those epidural injections were done by Dr. Ghadimi beginning in September 1999 at St. Peter's Hospital. Dr. Ghadimi administered steroid injections into claimant's neck (Tr. 230, CX 7) in three separate epidermal injection procedures approximately two weeks apart (Tr. 232). This treatment was essentially that which had been suggested by the neurosurgeon, Dr. Lanman, in October 1996. Between the second and third injections, he was seen by Dr. London. Claimant exhibited limited range of motion in all planes when he was examined, with pain at the extremes of left lateral rotation and left lateral bend (CX 9 at 51).

When Dr. London examined Claimant on October 8, 1999, he thought that Claimant's condition had once again reached maximum medical improvement. Dr. London repeated his view that Mr. Rancic had pre-existing, longstanding cervical disc degeneration at multiple levels, a condition which was aggravated as a result of the February 20, 1996 fall (CX 9 at 49). Dr. London stated specific work restrictions. He believed that Claimant was unable to perform work which involved prolonged forward flexion or repetitive lateral rotation of the neck, overhead work, or work involving heavy lifting or carrying, or forceful pushing or pulling with the upper extremities (CX 9 at 49). This was due to disc

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[12] This name is rendered in the transcript as Nabobbie (Tr. 230).

[13] This name is rendered in the transcript as Godemy (e.g., Tr. 230, *ff.*)

disease and arthritis, to spinal canal and foraminal stenosis and to the combination of levels of the cervical spine involved (London depo. at 99). The condition was not amenable to surgical correction (*id*. at 52, 101).

Dr. London later referred claimant to a neurologist in April 2000, Majid Molaie,[14] M.D. (CX 8 at 28-29), after symptoms of lightheadedness developed in March 2000. The history taken by Dr. Molaie records Claimant's continuing use of Vioxx and Darvocet for headaches, and that he had been disabled by a neck injury for the previous nine months. On examining Claimant, Dr. Molaiefound that Claimant's neck was moderately stiff in all directions; the doctor saw moderate spasms of the cervical paraspinal muscles, and Claimant exhibited symptoms consistent with benign positional vertigo. This neurologist diagnosed cervical paraspinal myofascial spasms related tocervical canal stenosis and moderately severe cervical radiculopathy at multiple levels.

Physical therapy continued through June 2000, *see* note 8, above. In the period he was off work, employer secured surveillance videos of Mr. Rancic. They mostly show him during early morning walks for exercise, sometimes wearing a cervical collar, other times not. One video shows him attending a horse track one day. The videos reveal nothing that I can see which is inconsistent with his testimony about his abilities, as they relate to the job duties of a marine gate clerk. No doctor viewed the videos and expressed an opinion that they showed actions inconsistent with the symptoms Mr. Rancic claimed.

E. Examinations and Evaluations Performed on Behalf of Employer.

Before the examination by Dr. Molaie, a defense medical examination was scheduled with Geoffrey Miller, M.D. on January 26, 2000. Dr. Miller acknowledges claimant's injury of February 20, 1996 in his narrative medical report dated March 9, 2000 (EX 7). He spent ½ hour interviewing and examining Mr. Rancic (*id*. at 78, n. 1). Dr. Miller recorded that Claimant complained of low grade pain and neck stiffness, with limitation of motion in cervical rotation to 25% to 50 % of normal, and posterior occipital headaches every 3 to 4 days (*id*.). He reviewed and summarized the medical information in the file, and ultimately concluded that the fall "most likely did aggravate his cervical spine disease, and that the cervical spine disease was problematic during the performance of his duties" (EX 7 at 88). Dr. Miller reviewed the MRIs, and confirmed advanced degenerative changes, which in his opinion did not show a lesion likely to be amenable to surgery. His dominant impression of the case is well summarized in the following passage of his report:

> [Claimant] has retired and he has done so with residual neck symptoms, but not with sufficient disability to preclude his employment, based upon three years of follow-up which never showed substantial disability and a sudden deterioration prompted temporary disability not weeks after the incident, not months after the incident, but

[14] This name is rendered in the transcript as Mulhay (Tr. 233).

> years after the incident after which the patient never made an effort to return to usual duties. I believe this to be quite clearly a situation where the patient was ready to retire, rather than truly disabled from this injury, even though I clearly agree with all the doctors that there are symptoms remaining. (EX 7 at 89)

Dr. Miller believed the Claimant had work restrictions, but did not specify them, as Dr. London had. Rather he took a functional approach, and found that "the restrictions he [Claimant] has are congenial with the occupation he was performing, so no additional restrictions are necessary" (EX 7 at 94). Nonetheless, he concluded that Claimant did have a pre-existing spine disorder, and that his "current disability is materially and substantially greater than what would otherwise be present with the February 20, 1996 incident, standing alone." (emphasis deleted) (*ibid*.at ¶ 6).

Employer discontinued payment of disability compensation benefits based on that report, retroactive to March 3, 2000 (EX 4 at 12; CX 20 at 101). A Notice of Controversion of Right to Compensation was filed by Employer on March 20, 2000 (EX 4). Employer also controverted the recommendation of the Office of Workers' Compensation Programs in the memorandum issued following the informal conference of May 19, 2000 (EX 4 at 15).

Dr. Miller examined Claimant again in March 2000 (EX 1 to Miller depo.). The results of the physical examination were essentially the same, and his conclusions did not change (*id.* at 3.)

After Dr. Molaie's report was done, Employer had Claimant examined by a neurologist too. Ronald D. Farran, M.D. examined Claimant shortly before the final hearing (EX 8). That evaluation is not one which has figured prominently in the opinions expressed by any of the testifying physicians. On his examination, Dr. Farran found no "significant" spasm in Claimant's neck, but his language is unclear on whether he saw any spasm at all. He did find tenderness in Claimant's neck between the C2-3 and C3-4 levels. Cervical range of motion in flexion, extension, and lateral rotation were all limited, but he characterized those limits as "slight"(EX 8 at 101c). The medical records he had for review for some reason failed to include the report of the other neurologist, Dr. Molaie. I would expect that a neurologist would be given the reports of other examining neurologists. This significant gap in Dr. Farran's knowledge of Claimant's condition limits the value of his opinion. His impression was that Claimant had chronic neck strain from the February 20, 1996 fall, which had become permanent and stationary by December 29, 1996, with flare-ups in 1998 and 1999; episodic dizziness; occipital headaches; and pre-existing, non-industrial degenerative cervical spondylosis. The job description he relies on for the work of a marine gate clerk, found in the portion of his report headed "Employment History," comes from Employer's vocational expert, Mr. Johnson. Dr. Farran concludes from his examination and medical records review that Claimant could do his past work as a gate clerk, and could also perform unspecified jobs away from the waterfront. The failure of the report to identify those other jobs substantially limits the usefulness of his opinion on the vocational issue, as does his reliance on the job description prepared by Mr. Johnson, which is discussed in detail below.

F. The Treating and Examining Doctors' Opinions.

After Dr. Miller's first examination report came in, Mr. Rancic continued to see Dr. London, who examined him again on April 24, 2000. Mr. Rancic then had good forward cervical flexion, but his extension was only 5 degrees, and lateral rotation was 40 degrees bilaterally (CX 9 at 38). Cervical motion was a little worse at June and July 2000 examinations, with tenderness in the mid-cervical area, and pain at the extremes of all ranges of motion (*id*. at 34, 36). When Dr. London saw him on October 23, 2000, the doctor recorded marked restriction in active motion in the cervical spine with very limited extension of about 5 degrees and left lateral bend also limited to about 5 degrees, plus tenderness, and pain on crepitation (grinding) of the neck (CX 7 at 30). These limitations in cervical range of motion observed by Dr. London are consistent with the neck stiffness and moderate paraspinal cervical muscle spasm observed by Dr. Molaie during his April 2000 examination.

1. Dr. Rothman

Steven Rothman, M.D., a board certified neuroradiologist with special expertise in reading MRI scans of the spine, was retained by Employer to review and compare the two MRI scans. The scans were performed on different machines, and utilized different techniques. While not identical, he found that the condition of Claimant's cervical spine in each scan was "remarkably similar" (Tr. at 625). He attributes any changes in the condition of the cervical spine shown on the two scans to the natural aging process (Tr. 619, 626). He does not see evidence of trauma – either work trauma or any other kind of trauma (EX 9 at 102).

2. Dr. London.

Dr. London testified by post-hearing deposition[15] that claimant suffers from a pre-existing cervical disc disease, including pre-existing cervical arthritis which was aggravated by Claimant's industrial fall on February 20, 1996 and his continuing work activities as a gate clerk (London depo. at 10, 54). In his interaction with Mr. Rancic, Claimant has been a credible reporter of complaints, and the doctor does not believe Claimant exaggerates his symptoms (*id*. at 59-60, 70-71, 91). The MRI scans show multiple level disc disease at C3-4, C4-5 and C5-6, worst at the C4-5 level where there is disc protrusion to the left, and bone spurs, plus narrowing of the spinal canal. Reading these scans, Dr. London was impressed by the combination of disc disease, arthritis, spinal canal and neuroforaminal stenosis, and the number of levels of the cervical spine involved (*id*. at 99). He found Mr. Rancic incapable of returning to his usual and customary work as a marine gate clerk (*id*. at 14-15, 42, 99), based, in part, on his findings that Mr. Rancic has continued to have consistent aching pain in his neck, pain which is intermittently sharp to severe and worse with efforts to rotate the neck to either side, extend the neck or to lean his head to the left. These limitations of motion of the neck in lateral rotation, lateral bend and in extension are symptoms consistent with arthritis *(id*. at 90-91). The Claimant now also experiences dizziness with his neck extended to the left and a grinding sensation (crepitus) during neck movement (*id*. at 14-15). Claimant's condition has not improved since his last day of employment

[15] Dr. London's deposition was taken post-hearing, on January 18, 2001 (CX 47).

on May 10, 1999. The bases for the work restrictions assigned are the increasing degree of Claimant's neck pain, and the restriction in movement of the neck substantially in all directions (*id*. at 17-18, 52).

Dr. London confirmed in a letter to Claimant's counsel of October 27, 2000 (CX 9, at 32-33) that he reviewed Dr. Steven Rothman's September 28, 2000 report to Employer (EX 9 at 102) on the two MRI scans of April 5, 1996 and May 27, 1999. Dr. London disagreed with the conclusions stated there. He believes that Mr. Rancic's pre-existing cervical disc disease was aggravated by a specific injury on February 20, 1996, and that Mr. Rancic's work after the February 20, 1996 accident caused him increased pain from those work activities which required him to rotate and extend his neck. The specific work incident on February 20, 1996 and the work after February 20, 1996, aggravated and worsened the pre-existing condition, causing it to be more symptomatic and disabling (*id*. at 33). He rejected at his deposition the idea that a person could do the work of a gate clerk by working at a desk, maintaining the head straight forward, and looking down with the eyes without flexing neck (London depo. at 98-99).

3. Dr. Miller.

The deposition of Geoffrey Miller, M.D. was conducted post-hearing by employer, on January 23, 2001. Dr. Miller finds no cumulative trauma injury. He bases his conclusion on the lack of any significant change in claimant's physical examinations documented by Dr. London over the course of the three years in question (*see generally* CX 9). Dr. Miller believes that Dr. London's physical examination findings over that time period were "consistently benign, reflecting a longstanding degenerative process. . . ." (Miller depo. at 34). He regards Dr. Nabavi's findings on July 22, 1999 (a little more than two months after he had been taken off work), as essentially normal. Dr. Nabavi recorded no spasms, no tenderness, essentially full range of motion, and no evidence of radicular symptomatology (*id*. at 36-37; *see also* CX 6 at 20). Dr. Miller also rejects Dr. Molaie's diagnosis of radiculopathy as unsupported by the findings given in Dr. Mollie's report. In addition, he bases his opinion on the lack of evidence in the 2 MRI scans of anything other than age-related changes (*id*. at 78).

He also commented unfavorably on Claimant's credibility. During the 2 physical exams he performed, Dr. Miller observed no cervical muscle spasm, which would limit motion due to pain (*id*. at 65 - 66). Because Claimant limited his cervical range of motion to about 50% of normal in all directions, he questioned Claimant's co-operation with his testing, and believed Claimant consciously limited his range of motion and did not make a good faith effort during his testing (Miller depo. at 13, 63). He emphasized that other examiners had not reported limitations of cervical motion during their examinations which were similar to Mr. Rancic's presentation when Dr. Miller examined him on those 2 days (*id*. at 65, 108). He also believed that Mr. Rancic has described symptoms more severe than the medical evidence warrants (*id*. at 58).

On this clinical evidence, and the report of Dr. Rothman interpreting the 2 MRI scans, Dr. Miller concluded that there has been no worsening in claimant's cervical spine condition between 1996 and 1999 (*id*. at 24, 26).

Dr. Miller's opinion does not totally discount Claimant's subjective complaints. He accepts that claimant suffers from chronic cervical strain beginning on the February 20, 1996, and longstanding, pre-existing degenerative disc disease. He acknowledges that it is reasonable that Claimant might continue to have some pain attributable to the strain of the cervical musculature resulting from the February 20, 1996, industrial incident (Miller depo. at 58-59, 114). Claimant's fall may have caused a modest amount of scar tissue to form in his para-cervical muscles, as distinct from causing an injury to the cervical discs, nerves, joints or to the bony structural components of the spine (*id*. at 97 - 100). This scar tissue in a person of his age could be an irreversible change causing symptoms of pain during certain types of activities, or muscle spasm, but the muscles in Claimant's neck have not lost their functional integrity (*id*. at 100-102, 116). Dr. Miller doubts that the strain here would lead to muscle spasms from repetitive flexion, extension or lateral rotation of the neck (*id*. at 118).

Dr. Miller rejects the idea that the use of the neck in flexion, extension and lateral rotation caused any degeneration in Claimant's cervical discs (*id*. at 103 -107). It could, but the degree of degeneration from such repetitive movements would vary from individual to individual. The degree of degeneration attributable to individual genetics cannot be easily isolated from any contribution from work activities (*id*. at 104 - 107). He found no objective evidence that the continuing work activities until May 10, 1999 aggravated Claimant's degenerative disc condition. He did not believe the work as a marine gate clerk challenged the capacity of Mr. Rancic's cervical spine (*id*. at 60).

Dr. Miller also explained why there was no aggravation of Claimant's neck condition, culminating on May 10, 1999, although he gave a diagnosis of a chronic muscular strain. While strained, the cervical musculature was nonetheless supporting the spine sufficiently. On cross-examination, he stated:

> Q. So now you're qualifying the degree of injury, if you will, of the muscle tissues in Mr. Rancic's spine? Are you saying that, in your opinion, you agree that he has cervical pain, that is, pain in the muscles, but now you're saying that you believe that the insult to the muscles themselves is slight?
>
> A. Absolutely. And the reason, of course, is the spine is getting the support it's requiring based on the MRI. The MRI is very important here because those muscles support that spine. If they weren't supporting it at a good functional level, there would be other findings in that cervical spine that would reflect that, and we're not having those findings. (Miller depo. at 102)

In other words, both the diagnosis of a chronic cervical strain of mild degree, and the opinion of no aggravation injury culminating on May 10, 1999, are supported by the insignificant changes in the 1996 MRI and the 1999 MRI. The non-industrial, pre-existing and longstanding degenerative disc disease in the cervical spine may be worsening due to the aging process, as reflected in the minor changes, if any, depicted in the 2 MRI scans. This natural progression of the underlying degenerative disc disease might explain why claimant would develop new symptoms such as dizziness almost a year after his last exposure to the allegedly harmful work activities (see Tr. 233). On the other hand, the chronic cervical strain has remained benign, as the cervical musculature continues to provide adequate support for the spine (Miller depo. at 102).

4. Analysis.

There is no dispute that Mr. Rancic sustained an injury on February 20, 1996, or that he has a degenerative condition in his cervical spine. Dr. Rothman's opinion is consistent with Dr. London's position that in looking solely at the MRI results, "I can't say that there's been a change that I would attribute either to trauma or to time" (London depo. at 84-85). Dr. London questioned Dr. Rothman's ability to make any allocation of causation for Mr. Rancic's symptoms either to progressive degenerative disc disease or to trauma (or any other cause), for as a radiologist who has never seen the patient, Dr. Rothman is in no position to correlate symptoms with the MRI results (London depo. at 83). But as the long-term treating source, Dr. London could do just that. Dr. London witnessed the progression of Mr. Rancic's symptoms and made clinical findings about it during his examinations of Mr. Rancic over time. Claimant became more symptomatic and stiffer, while describing a constant dull aching pain, becoming sharp and more severe with activity -- pain complaints consistent with his condition (*id*. at 85, 88, 91). During his testimony, Dr. Rothman basically acknowledged the limitation in his ability to give an opinion on the issue before me. I am dealing with the combination of a progressive condition of disc degeneration which Claimant has, coupled with trauma of some magnitude. Dr. Rothman found that in trying to parse out the contribution of a patient's progressive disease versus some trauma, the patient's clinical course is more important than looking at an imaging study like an MRI scan (Tr. 631-34).

I do not find the opinion of Dr. Rothman especially helpful. Certainly he is an eminently qualified neuroradiologist. Yet his contribution to the questions before me is quite limited, as he has never examined Claimant, and is limited to reading MRI reports without the ability to correlate his impressions from those readings with clinical findings on examination.

I am not persuaded by Dr. Miller's analysis, as compared to Dr. London's. The Ninth Circuit requires me to carefully consider the opinion of the treating orthopedist in this case, where an employee is seeking benefits under the Longshore Act. *Amos v. Director, Office of Workers' Compensation Programs*, 153 F.3d 1051 (9th Cir. 1998), *opinion amended* 164 F.3d 480 (9th Cir. 1999), 32 BRBS 144 (CRT), cert. denied sub nom. *Sea-Land Service, Inc. v. Director, OWCP*, __ U.S. __, 120 S.Ct. 40 (1999). Dr. Miller does treat patients, but about half of his practice is devoted to performing evaluations for employers in industrial cases, as he was doing here (Miller depo. at 67 - 68).

Dr. Miller was an infrequent examiner of Mr. Rancic, while Dr. London was the one "employed to cure and ha[d] a greater opportunity know and observe the patient as an individual", *Amos* 153 F. 3d at 1054, relying on *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989) and *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir. 1987). Dr. London is in the better position to analyze Mr. Rancic's condition and its cause.

The Ninth Circuit's position on the preference to be accorded opinions given by treating physicians under the Longshore Act has developed from cases interpreting the Social Security Act, and the regulations implementing it, in cases such as *Magallanes* and *Sprague*. Other administrative law judges dealing with Longshore claims in the Ninth Circuit have looked to Social Security decisions for guidance in determining how to evaluate disability opinions of medical experts, *see*, *e.g.*, Judge Burch's decision in *Brown v. National Steel and Shipbuilding Co.*, 34 BRBS 26 (ALJ) at 32-33. The controlling Social Security regulations for evaluating physician opinions concerning disability are found at 20 C. F. R. § 404.1527(d)(1) through (6). They are not directly applicable in a Longshore case, but because *Amos* holds that "the same logic applies in cases involving industrial injuries," 153 F.3d at 1054, I believe those regulations provide a valuable framework for assessing the relative weight I ought to assign to conflicting medical opinions. The regulations require an adjudicator to consider much more than status, *i.e.*, whether the source of the opinion is only an examiner or is a treating doctor. They instruct the adjudicator to consider the length of the treatment relationship and the frequency of examinations, giving more weight to the opinion of a doctor who has treated the patient a number of times, long enough to obtain a longitudinal view of the functional impact of the relevant impairment 20 C.F.R. §404.1527 (d)(2)(i). They also ask whether the source of the opinion is knowledgeable because he or she is focusing treatment on the impairment at issue and using specific examinations or laboratory tests to treat that condition, or is merely making passing comments on the condition while focusing care on some other body system, 20 C.F.R. §404.1527(d)(2)(ii). The regulations require consideration of "supportability," whether there is a supporting explanation for the opinion under consideration, whether medical signs and results of laboratory studies support the opinion, and whether it considers all the relevant medical evidence, 20 C.F.R. §404.1527(d)(3). The adjudicator is to consider whether the opinion is consistent with the record as a whole, 20 C.F. R. § 404.1527(d)(4), and whether it is expressed by a specialist in the area of his or her specialty, or is one from a general practitioner, 20 C.F.R. § 404.1527(d)(5). The final consideration is the extent to which the opinion is one from a source familiar with the specific disability program at issue and its evidentiary requirements, 20 C.F.R. §1527(d)(6).

Dr. London was consulted to treat the condition at issue, and Dr. Miller to evaluate that condition, so the factor described at 20 C.F.R. 404.1527 (d)(2)(ii) gives very little reason to prefer either opinion. Drs. London and Miller are both well qualified in the relevant speciality of orthopedics, so the factor set out in 20 C.F.R. § 404.1527(d)(5) is not useful to me here. Both are familiar with the requirements of the Longshore program, as their written reports show, so 20 C.F.R. §1527(d)(6) is also unhelpful.

Other factors do assist me, however. Dr. London has seen the Claimant often since 1996, from his

written reports at least 30 times. Dr. Miller has seen him rarely; only twice for evaluation, and never for treatment; once in January 2000 for ½ hour (EX 7 at 77 & n.1) and again in late November 2000 for no more than that (Miller depo. EX 1 at n. 1), although he did have the opportunity to review the pertinent medical records. Dr. London did not determine Claimant was unable to work after examining claimant twice, but came to this view only over time. He had the opportunity to learn during the course of their relationship whether to accept at face value the complaints Claimant gave him, and he has accepted them. He was chosen initially as a forensic examiner by the Employer, and this is meaningful to me. I infer from the Employer's choice that he is experienced in not taking all complaints by workers at face value nor is he extravagant in his expression of limitations; his testimony confirms this (London depo. at 70). He found the complaints or symptoms Claimant expressed sufficiently consistent with his clinical findings, the findings of other physicians to whom he referred Claimant, the objective testing by 2 MRI scans and his diagnoses to conclude that Claimant could no longer do the work of a marine gate clerk as of May 12, 1999. The opinion of Dr. London ought to be somewhat more persuasive due to these factors which are rooted in his long term treating relationship with the Claimant, 20 C.F.R. §404.1527 (d)(2)(i).

Dr. London articulated a supportable basis for his findings, which include the 2 MRI scans, the progressive nature of the symptoms Claimant gave when examined, and the medical signs Dr. London observed over time as Claimant's cervical stiffness increased and his range of motion decreased, which he recorded in his findings on his examinations. Dr. London was not the only examiner to observe the clinical sign of limited range of motion of the Claimant's neck before Dr. London took Claimant off work. Dr. Molaie also found Claimant's neck to be moderately stiff in all directions in April 2000 (although no measurements in terms of degrees of movement were recorded), due to the observable clinical sign of "moderate spasm of the para-spinal muscles." (CX 8 at 29).

I also believe that Dr. London's conclusions are better supported, 20 C.F.R. §404.1527(d)(3). Dr. London has opined that claimant's "specific work incident on 2/20/96 and his work after 2/20/96 aggravated and worsened the pre-existing condition [cervical disc disease], causing it to be more symptomatic and disabling" (CX 9 at 33). Dr. London believes that the changes in Claimant's medical condition were partly attributable to natural progression of his underlying disc disease, and partially related to his ongoing work activities (London depo. at 21-22). The activities of frequent cervical rotation from side to side, as well as extension and flexion of the neck caused worsening in the underlying disc disease (London depo. at 22). Dr. Miller errs in maintaining that Dr. London's opinion of a cumulative trauma aggravation injury is unsupported by objective evidence. The medical signs of limited range of motion and tenderness are recorded among Dr. London's findings, and this is consistent with what Dr. Molaie found on his exam – cervical para-spinal muscle spasm and limited range of motion (CX 8). Dr. Farran observed the medical sign of tenderness in the neck. These observations by examiners are consistent with some of what Dr. Miller stated he would expect in a person with genuine limitation of cervical motion, and lend support to Dr. London's views.

Dr. Miller accepts that a person of Claimant's age who suffered a fall causing chronic neck strain could

have scars form in the cervical muscles, when the muscles tear at the time of the fall, as they absorb the fall's energy. These scars can result in irreversible changes, which would not reduce the functional integrity of the muscle, but may cause symptoms, such as pain, with certain activities (Miller depo. at 99 - 101). Dr. Miller disagrees with Dr. London about the mechanism causing the pain which Claimant reported at examinations and which he testified about, but Dr. Miller acknowledges an anatomical basis for ongoing pain and some limitations in use of the neck, caused by the attempt to avoid pain. I am less concerned with the mechanism of the limitation than the functional consequences to the Claimant of those limitations. Dr. Miller believes those consequences are not severe enough to preclude a return to the work of a gate clerk, and Dr. London disagrees. This is a matter that Dr. London is in the better position to evaluate.

I believe Dr. Miller focuses too much on the long interval between the fall and the time Claimant stopped work, and not enough on the treatment attempts during that interval. Claimant did not just suddenly stop work in May 1999, attributing that cessation to his 1996 fall. Since February 1996, he had consistently been under the care of Dr. Ursich and then of Dr. London, receiving treatment for his neck and upper extremity complaints. He was in physical therapy for a long time: first from Dr. Ursich's treatments, then from Palos Verdes Rehabilitation Clinic under renewed prescriptions from Dr. London, then from Scott Sanders, D.C., from early September 1997 through December of that year (CX 41), returning to Palos Verdes Rehabilitation Clinic for physical therapy from February 1998 to June 2000 (CX 40 at 552, 561). Mr. Rancic believes that he was able to continue to work from the combination of this therapy and medications and his home exercise program. His clinical condition was deteriorating, even if the MRI results were not reflecting this in a significant way. While Dr. Miller doubted all the physical therapy was helpful (Miller depo. at 83), it does indicate to me that Mr. Rancic took advantage of whatever treatment was offered to alleviate his discomfort, even long after he left work. This action on his part makes me more inclined to accept his subjective complaints of pain and stiffness limiting his ability to flex, extend and rotate the neck laterally. It contributes to my belief that Dr. London's opinion is the one most consistent with the medical record as a whole.

I also note that in his first opinion letter, Dr. Miller did see the fall as an aggravation to Claimant's cervical disc disease, opining that the fall "most likely did aggravate his [Claimant's] cervical spine disease, and that the cervical spine disease was problematic during the performance of his duties" (EX 7 at 88). He also made a finding in that same letter relevant to the § 8 (f) issue, stating that Claimant's "current disability is materially and substantially greater than what would otherwise be present with the February 20, 1996 incident, standing alone." (EX 7 at 94, ¶ 6). These statements seem to me inconsistent with his opinion at his deposition. The fall did aggravate the Claimant's problems with his neck.

Dr. Miller also seems to dismiss the disc degeneration as a non-industrial condition which would have progressed whether Claimant worked or not. He believes the level of physical activities of a marine clerk would not contribute to increased symptoms (Miller depo. at 60). This fails to account adequately for the wear and tear on Claimant's neck following the accident from the repetitive flexion, extension

and lateral rotation of the neck done at work, as Dr. London maintains. The degree of wear from work was not quantified, and I doubt there was any way to do so. But the record convinces me that Claimant did a job where frequent cervical flexion, extension and lateral rotation were required, plus upper extremity extension maneuvers. Dr. Miller was somewhat evasive about whether neck activities at work over the years following the fall in February 1996 until Claimant left work in May 1999 would cause further symptoms or limitations to Mr. Rancic, because he believed the degree of limitation from use is a function of the individual's genetics (Miller depo. at 105 - 107). He did not hazard any assessment about how likely it was that Mr. Rancic's individual genetics lead to additional limitations in the use of his neck from flexion, extension and lateral rotation at work over time. On this point the testimony of Dr. London was more direct and convincing. He believes the ongoing use of the neck at work did contribute to Mr. Rancic's inability to continue in the work after May 10, 1999. This is not like a situation where a congenital foot condition worsens over time while a claimant performs a sedentary job. It is more analogous to a case where the congenital foot condition worsens while a claimant remains in a job requiring frequent walking. I am persuaded that there is a significant work related component to the functional deterioration Mr. Rancic experienced in his neck condition, as shown by the decrease in his range of cervical motion recorded by Dr. London, by Dr. Molaie, by Dr. Farran, and by his increased pain.

I also think that Dr. Miller underestimated the impact of Claimant's pain because of his doubts about Mr. Rancic's credibility, doubts which I do not share.

G. Vocational Expert Testimony, and Claimant's Wage Earning Capacity.

Paul D. Johnson, M.A., conducted two job analysis of claimant's position as a gate clerk at Matson Terminals[16] (EX 16 at 190-99). The testimony of Mr. Rancic, Mr. Warren and Mr. Scognamillo, taken together, convince me that the representative job analyses done by Mr. Johnson are not fully "representative" of that work. For example, he does not objectively describe typical head movements done by gate clerks in the portion of his report on cervical mobility factors, he editorializes with this language:

> Gate Clerks ***may potentially*** engage in cervical flexion activities frequently and intermittently for brief periods (depending on one's touch typing skills) throughout a typical work shift when glancing down at the key board from the video display terminal. ***Such flexion activities may also be significantly reduced or entirely eliminated by merely keeping one's head in a vertical plane in front of the key board and shifting one's gaze downward, rather than actually physically flexing one's***

[16] He did not specifically evaluate the job as it would be performed at other maritime employers, to whom Mr. Rancic could be sent if he returned to the joint union/Pacific Maritime Association dispatch hall for work as a marine clerk (Tr. 164, 166). Different employers have different physical plants and use different procedures (Tr. 175).

cervical spine. (EX 16 at 197)(All emphasis in original)

This passage leaves me with the impression that the report was constructed with a pre-determined conclusion in mind, rather than neutrally written to describe the demands of the job. In describing the necessary cervical extension activities, he posits as a "simple and cost-effective reasonable accommodation" the use of the hand held mirror to read the identification numbers on containers (*id.* at 198). Mr. Johnson sent this analysis to Dr. London, who replied on April 3, 2000 that Mr. Rancic could perform the gate clerk position as Mr. Johnson described it, on the condition that Claimant used the job modifications which Mr. Johnson suggested. When he gave his opinion, Dr. London indulged the assumptions that:

> only on rare occasion when over-height and/or over-length containers come through a gate must a gate clerk physically get up, exit the booth and walk around the container in order to estimate its height or length. The job description indicated that 90 to 93 percent of the work day was spent sitting to operate a computer. Furthermore, the job description indicated that in operating the computer the gate clerk might potentially engage in cervical flexion activities frequently and intermittently for brief periods throughout a typical work shift, but that such flexion activities could be significantly reduced or entirely eliminated by keeping one's head in a vertical plane in front of the keyboard and shifting one's gaze downward rather that physically flexing one's cervical spine. In regard to cervical extension, the job description indicated that when a container number was not read or was not legible as a truck approaches the gate, the gate clerk must then engage in significant cervical extension/rotation activities in order to be able to review the container's identification number as the truck is parked immediately adjacent to the gate booth. The job description indicated that that activity could be eliminated by the use of a glare-resistant mirror.
>
> The work restrictions that I previously outlined in my 10/12/99 report remain pertinent. If Mr. Rancic were able to utilize the modifications outlined in the job description for overhead work and if he did not have to engage in prolonged forward flexion, then he can perform the work of a gate clerk. If those are inherent parts of the job that he cannot avoid, then he cannot perform the work of a gate clerk. (CX 7 at 40-41, EX 10 at 109-110)

I have already explained my reasons for rejecting the accommodations Mr. Johnson relies on, in the form of the mirror, and in the form of maintaining the head in a level plane (see n. 10 above), and will not repeat them here. With the limitations articulated by Dr. London in his letter of October 12, 1999 (CX 9 at 49) and in his deposition, Claimant cannot return to the work of a marine gate clerk.

Dr. London also reviewed the second analysis of Mr. Johnson (EX 16 at 201a *et seq*.), which included the modifications to the job from the installation of the video cameras at the gate booths. The doctor did

not believe that Claimant could do the job, because he did not believe claimant could actually do the job and keep his head in a fixed plane, eliminating cervical flexion (London depo. at 97). It would not be practical for Mr. Rancic to work at a desk and keep his head straight forward, and be looking down at the desk top throughout the day, and swiveling in his chair to shift his view (*id*. at 98).

Mr. Rancic has a permanent partial disability with respect to his cervical spine as the result of the February 20, 1996 fall and the cumulative trauma from remaining at work thereafter, culminating on May 10, 1999. These prevent him from performing work requiring prolonged forward flexion or repetitive lateral rotation of the neck, overhead work, or work involving heavy lifting or carrying, or forceful pushing or pulling with the upper extremities (CX 9 at 49). These limitations preclude his work as a marine gate clerk.

H. Calculation of Loss of Wage Earning Capacity.

An award for permanent partial disability in a claim like this one, which is not covered by the statutory schedule, is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); *Richardson v. General Dynamics Corp.*, 23 BRBS (DOL Ben. Rev. Bd.1990); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (DOL Ben. Rev. Bd.1988). If a claimant cannot return to his usual employment as a result of his injury but has secured other employment, the wages which the new job would have paid at the time of the claimant's injury are compared to that claimant's actual pre-injury earnings, to determine if that claimant has suffered a loss of wage earning capacity. *Cook, supra*. 33 U.S.C. § 90 8(c)(21) and 8(h) require that post-injury wages be adjusted to the wage levels the job paid at time of injury. *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 695 (DOL Ben. Rev. Bd.1980). The proper comparison for determining a loss of wage-earning capacity is between the wages a claimant received in his usual pre-injury employment and the wages a claimant's post-injury job paid as of the time of the injury. *Richardson, supra*; *Cook, supra*.

When a claimant has not secured other employment, an employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available in close proximity to the place of injury. *Royce v. Erich Construction Co.*, 17 BRBS 157 (DOL Ben. Rev. Bd.1985). Generalized labor market surveys are not enough. *Kimmel v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 412 (DOL Ben. Rev. Bd.1981). For the job opportunities to be realistic, an employer must establish their precise nature and terms, *Reich v. Tracor Marine, Inc*., 16 BRBS 272 (DOL Ben. Rev. Bd.1984), and the pay scales for the alternate jobs. *Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024 (DOL Ben. Rev. Bd.1978). While I may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, *Southern v. Farmers Export Co.*, 17 BRBS 64 (DOL Ben. Rev. Bd.1985), an employer's evidence must identify specific available jobs.

I believe Mr. Rancic remains able to work at several of the jobs Mr. Johnson identified in his labor

marker survey, EX 17 at 205. These jobs are: Dispatcher, Parking Lot Attendant, Lobby Ambassador, and Security Guard. Dr. London reviewed those job descriptions and testified he believed Claimant could do them (London depo. at 103). I find inappropriate, however, the job of kitchen/tower clerk supervisor which Mr. Johnson included, as the requirements for cervical flexion, extension, and lateral rotation in that job are said to be the same as those for the gate clerk in his flawed representative job analysis (*see* EX 17 at 206), and I have already found the job of a gate clerk inappropriate for Mr. Rancic. Dr. London did not testify that Claimant could do that supervisory job when he reviewed the jobs suggested. The other 4 jobs are appropriate given Claimant's age, education, background and medical status. Named employers seeking employees within the geographical area in which Claimant was injured were given. Employer has proven these jobs were appropriate and available to him as required by *Bumblebee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1230 (9th Cir. 1980). Claimant's proposed decision and order, at pg. 73, ln. 1-2, even concedes this.

Based on the labor market survey for these 4 jobs, I find Claimant would earn $8.50 per hour at jobs of these types. Assuming work for 40 hours per week at $8.50 per hour for these jobs, he now has an earning capacity of $340 per week. The difference between his stipulated pre-injury average weekly wage of $ 2,687.94 found in stipulation ¶ 6 and this potential weekly wage of $340 at these jobs is $2,347.97. This exceeds the maximum compensation rate of $871.76 as of May 10, 1999 (see Stipulation ¶ 6), so his compensation rate is $871.76 per week.

I. Medical Treatment for Continuous Trauma Injury Culminating on May 10, 1999. Claimant is entitled to medical care to relieve the effects of his symptoms including neck pain, headaches and dizziness under 33 U.S.C. § 907. The opinion of the treating physician, as reflected in his reports (CX 9 at 30-89), and particularly his deposition testimony, establish that Claimant's pre-existing cervical disc disease was aggravated by continuous trauma at his work, culminating on May 10, 1999 (*see* CX 9 at 49, 68). Employer has a continuing obligation to provide medical care for Claimant's symptoms resulting from his work-related aggravation of his neck condition. *Salusky v. Army Air Force Exchange* 3 BRBS 22, 26 (DOL Ben. Rev. Bd. 1975); Abbott v. Dilllingham Marine and Manufacturing 14 BRBS 453 (DOL Ben. Rev. Bd. 1981), *aff'd*, 698 F.2d 1235 (9th Cir. 1982).

J. Reimbursement to State of California Employment Development Department. Claimant sought short-term disability payments from the State of California Employment Development Department, after Employer suspended his Longshore disability compensation benefits as of May 4, 2000 when it controverted his right to additional compensation (CX 21 at 102-103, CX 17 at 97). He contends that Employer is liable to repay the State for its payments to him. I cannot accept this assertion. In the first place, the State of California is not a party here, and I do not understand what authority I would have to require Employer to make any payments to the state. In his post-hearing filings Claimant does not explain a legal basis for his position, by citation to any pertinent regulations or cases.

Even if I accepted his argument, I do not know from the evidence the total amount the State has paid in benefits to Mr. Rancic, and on that point he has failed in his proof. The record only contains a statement that State benefits of $336.00 per week began to be paid to him on March 4, 2000 (CX 21 at 103). No total amount is given that I can find. CX 21 seems to be a type of notice of a lien by the State, but the Longshore Act precludes any liens on its benefits, 33 U.S.C. § 916. Mr. Rancic may receive a double recovery for periods in which he is eligible for permanent partial disability compensation benefits under this decision, and for which he already received State short-term disability compensation payments. There is no logical reason why Employer should pay him Longshore benefits back to the time it terminated his Longshore benefits under Dr. Miller's report, and also re-pay the State of California for benefits it paid to Mr. Rancic for the same period. He is the one who will receive duplicate benefits, and he must make arrangements to repay the State. Employer has no right of offset to reduce its duty to pay benefits under § 3 (e) of the Act, as they are not workers' compensation benefits, but first party insurance benefits Claimant had purchased. His Longshore benefits are stipulated to be $871.76 per week as of May 10, 1999. He will recover more than enough to repay those State benefits of $336.00 per week himself.

K. Interest on Unpaid Benefits.

Mr. Rancic is permanently partially disabled by his May 10, 1999 cumulative trauma injury. The parties stipulated that his average weekly wage on May 10, 1999 was $2,687.94, entitling him to disability payments of $871.76 per week under 33 U.S.C. § 908. Additionally, Employer must make a retroactive adjustment on disability benefits it paid to him between May 12, 1999 and March 3, 2000. Those benefits were paid at a weekly rate of $782.44, assuming Claimant's disability was related to the injury on February 20, 1996. His injury after May 12, 1999 included the cumulative trauma which culminated on May 10, 1999, not only the February 20, 1996 injury, so the higher benefit rate applies.

The text of the Longshore Act does not provide that interest be paid on past due benefits. Nonetheless, the Benefits Review Board and federal appellate courts have held interest is due on awards, as payment of interest is consistent with the congressional purpose of making workers whole for their injuries. *Watkins v. Newport News Shipbuilding & Dry Dock Company*, 594 F.2d 986, 987 (4th Cir. 1979); *Strachan Shipping Company v. Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971), cert. denied 406 U.S. 958 (1972); *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 269 (DOL Ben. Rev. Bd.1984), *decision on recon*., 17 BRBS 20, 23 (DOL Ben. Rev. Bd.1985). Interest is due on unpaid or underpaid benefits at the interest rate set in 28 U.S.C. § 1961. It accrues on each unpaid or underpaid installment of compensation benefits from the date compensation actually became due until the date of actual payment.

L. Adjustment to Wage Loss Inapplicable.

Under 33 U.S.C. § 910 (f), permanent total disability benefits are adjusted for inflation each year. I have accepted the opinion of the treating physician, Dr. London, that Mr. Rancic can perform non-maritime work as a dispatcher, parking lot attendant, lobby ambassador and unarmed security guard as

Mr. Johnson described those jobs. Employer has demonstrated suitable alternative employment, so Mr. Rancic is permanently partially disabled, not permanently totally disabled. He not entitled to any annual adjustments.

M. Section 8(f) Relief and Aggravation.

33 U.S.C. § 908 (f) limits an employer's liability for permanent disability benefits when an employee suffers a work related injury which aggravates, accelerates, worsens or otherwise contributes to a pre-existing permanent disability. It shifts liability to the Special Fund, an employer-funded entity created under Section 44 of the Act and administered by the Director, Office of Workers' Compensation Programs. 33 U.S.C. § 944; 20 C.F.R. §§ 702.143-702.147. In order to be entitled to such relief, an employer must establish that:

1. The employee had an existing permanent partial disability prior to the employment injury;

2. The disability was manifest to the employer prior to the employment injury; and

3. The current disability is not due solely to the most recent injury.

33 U.S.C. § 908(f); Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 1144 (9th Cir. 1991). The District Director has already conceded in its pre-hearing filings that the first 2 requirements are satisfied in this case. With respect to the third requirement, the employer must show that as a result of the pre-existing condition, the current disability is "materially and substantially" greater than it would be from the employment injury alone. Sproull v. Director, OWCP, 86 F.3d 895, 900 (9th Cir. 1996).

Before the February 1996 fall and the cumulative trauma which caused him to cease work after May 10, 1999, Claimant's physical limitations included those caused by his earlier shoulder surgery. These were no ladder climbing, no heavy lifting (over 30 pounds), no prolonged overhead lifting, or overhead work (London depo. at 105). Mr. Rancic was able to perform the duties of the supervisory clerk and those of the gate clerk despite these limitations. He reached maximum medical improvement from his neck conditions on October 8, 1999 (*see* Stipulation ¶ 8). His permanent limits from these were substantially greater than those he had from his longstanding cervical disc disease, as Dr. Miller had found (EX 7 at 94 ¶ 6). After he reached maximum medical improvement on October 8, 1999 he has been unable to perform work which involves prolonged forward flexion or repetitive lateral rotation of the neck, overhead work, or work involving heavy lifting or carrying, or forceful pushing or pulling with the upper extremities (CX 9 at 49). These conditions are properly regarded as permanent limitations. Employer has satisfied all conditions for Special Fund relief, including the requirement for proof of a "materially and substantially" greater disability.

N. Entitlement to Reasonable Attorney's Fees and Costs.

Employer initially accepted the claim after Claimant left work on May 10, 1999 and began paying both medical and disability compensation benefits. These were terminated after Employer received the report of Dr. Miller in March 2000. Later, Employer controverted the recommendation of the Office of Workers' Compensation Programs in the memorandum issued following the informal conference of May 19, 2000 (EX 4 at 15). Claimant's counsel is entitled to reasonable attorneys fees and legal costs incurred in obtaining additional compensation benefits, 33 U.S.C. § 928 (b).

V.
ORDER

1. Employer shall adjust the earlier compensation benefit payments it paid to Claimant for temporary total disability compensation during the period from May 12, 1999 until October 8, 1999 from $ 782.44 per week to the correct amount of $871.76. A similar adjustment shall be made for the payments for non-scheduled permanent partial disability compensation payments for the period from October 9, 1999 until March 3, 2000.
2. Employer shall reimburse claimant for any unpaid medical expenses incurred as a result of the February 20, 1996 fall and the cumulative trauma culminating on May 10, 1999 as work related injuries under § 7 of the Act.

3. Employer shall pay claimant permanent partial disability compensation at the rate of $871.76 per week from March 4, 2000 (the day after it terminated permanent partial disability compensation benefits), until otherwise ordered.

4. Employer shall pay interest on each unpaid installment of compensation from the date compensation actually became due until the date of actual payment. The rate of interest shall be that set in 28 U.S.C. § 1961, compounded annually as that statute requires.

5. Employer remains liable for all reasonable medical expenses necessitated into the future as a result of the February 20, 1996 fall and the May 10, 1999 cumulative trauma injury.

6. Claimant's application for an adjustment under § 10 (f) of the Act to the compensation benefits for permanent partial disability payable to him is denied.

7. Claimant's application for reimbursement to the State of California, Employment Development Department for short-term disability benefit payments he received from that state agency after the Employer terminated his permanent partial disability benefits is denied.

8. Employer's obligation to pay compensation benefits for the cumulative trauma injury

culminating on May 10, 1999 is limited to104 weeks of permanent partial benefits, beginning as of October 8, 1999 . After cessation of compensation benefit payments by the Employer, under the provision of § 8 (f) of the Act, continuing benefits shall be paid by the Special Fund established in § 44 of the Act.

9. Any petition of attorney's fees and costs must be prepared on a line item basis and comply with 20 C.F.R. § 702.132 in order to be considered. It must be filed within 20 days after service of this Order by the District Director. If a fee petition is filed by Claimant, any objection(s) by Employer shall be stated on a line item basis, including the reason for the objection and an explanation. Objections shall be filed within 10 days after the fee petition is deemed received by Employer, based on the rules for service of documents by U. S. mail. Items which are not the subject of an objection in the manner required will treated as admitted, and will be allowed. Counsel for Claimant may file a line item response to any objections within 10 days after the objections are deemed received by Claimant, based on the rules for service of documents by U. S. mail.

10. All computation of benefits and other calculations which must be made to carry out this order are subject to verification and adjustment by the District Director.

A
WILLIAM DORSEY
Administrative Law Judge